No. 367.

FILED
MAR 20 1914
JAMES D. MAHER
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1913.

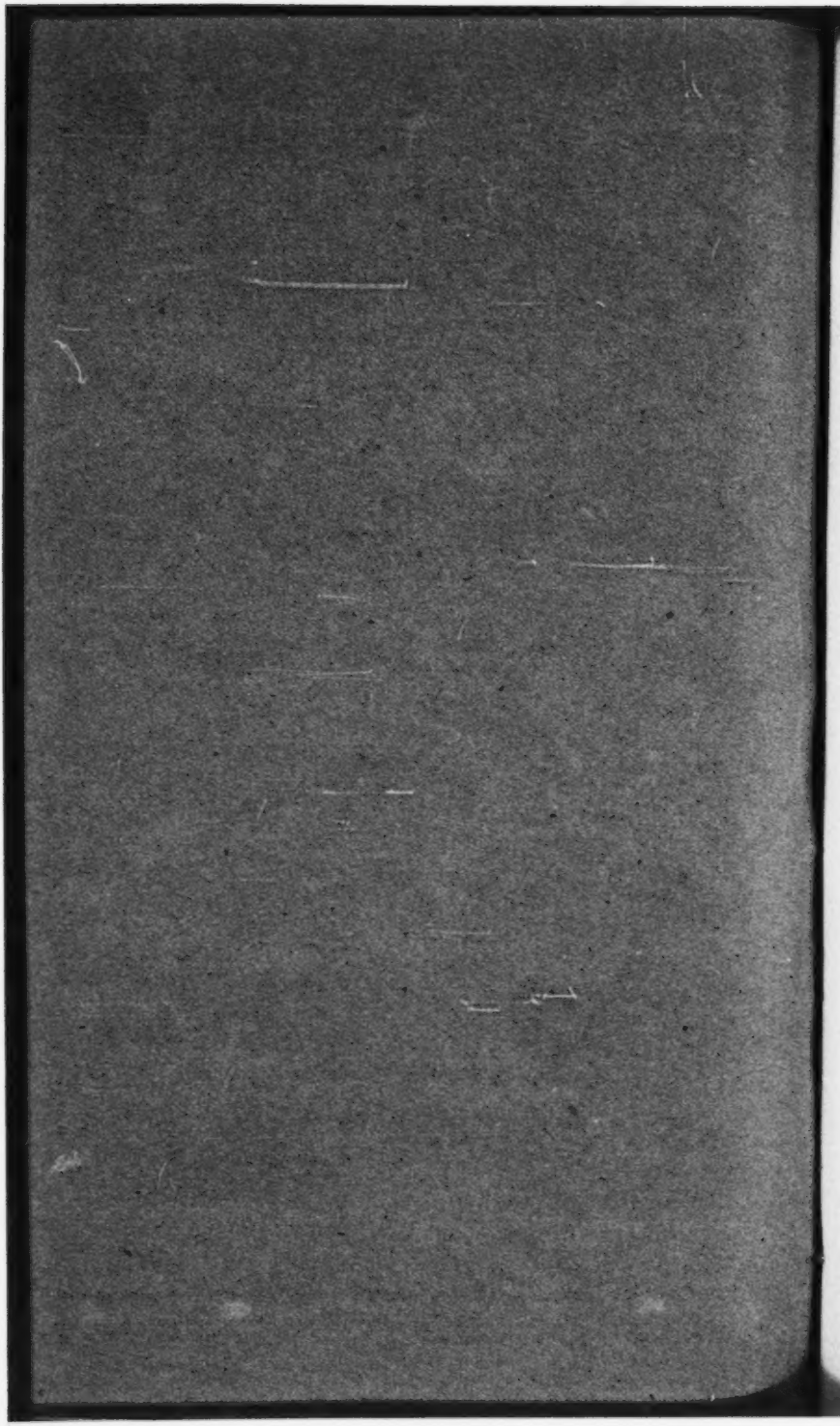
WASHINGTON SECURITIES COMPANY,
Appellant,
vs.
THE UNITED STATES,
Appellee.
No. 367.

Appeal From the United States Circuit Court of Appeals for the Ninth Circuit.

Brief for the Appellant

H. B. CLISE,
CHARLES KENNEDY POE, and
CHARLES POE,
Attorneys for Appellant.

THE IVY PRESS, THIRD AND CHERRY, SEATTLE



In the Supreme Court of the United States

OCTOBER TERM, 1913.

WASHINGTON SECURITIES COMPANY, *Appellant*, vs. THE UNITED STATES, *Appellee*.	No. 367.

Appeal From the United States Circuit Court of Appeals for the Ninth Circuit.

Brief for the Appellant

H. R. CLISE,
CHARLES KENNEDY POE, and
CHARLES POE,
Attorneys for Appellant.

INDEX TO POINTS AND AUTHORITIES.

Pages

STATEMENT OF CASE ..... 1 to 4

ARGUMENT ..... 10 to 51

Points.

ASSIGNMENT OF ERRORS ..... 5 to 11

AGENTS:

How far knowledge of chargeable to principal..... 17 & 18

Can knowledge thereof be imputed to subsequently organized corporation ..... 17 to 19

Knowledge acquired by outside employment not imputable to principal 17

COURTS:

Effect of adverse finding by two lower 10

Generally conclusive upon Supreme Court 10

Must, however, be supported by substantial proof and not based upon conjecture, etc. 10

Duty of Supreme to examine record 10

EVIDENCE:

Of fraud must be clear, cogent and convincing 11

Rule applies equally to government and individuals..... 11

With increased force when legality of a patent is involved. 27 to 29

FRAUD:

Never presumed 12

Proof of must be clear and convincing 11

HARRINGTON VS. UNITED STATES, 11 Wall. 356, discussed ..... 21, 22 & 23

LAND: Distinction between known as and known to be mineral ..... 30 & 31

LAND OFFICE:

Decision final when proceedings adversary..... 33 to 38

Decision here made finally binding upon the courts..... 34 to 40

McCASKILL VS. UNITED STATES, 216 U. S. 506, discussed.. 42 to 51

PRESUMPTIONS:

Favor the integrity of a patent that officials have done their duty and rendered a correct decision..... 33 & 34

Authorities.

	Pages
Beyer vs. Le Fevre, 186 U. S. 114	10 & 46
Brennan vs. Emery-Bird, 99 Fed. 971	18
Christman vs. Miller, 197 U. S. 313	31
Colorado Coal & Iron Co. vs. United States, 123 U. S. 307	29, 31 & 43
Davis etc. Co. vs. Davis, 20 Fed. 699	18
Davis vs. Weibold, 139 U. S. 507	31
DeCambra vs. Rogers, 189 U. S. 119	40
Deffeback vs. Hawke, 115 U. S. 392	31
Downer vs. Richards, 151 U. S. 658	31
Greenameyer vs. Coate, 212 U. S. 434	40
Harrington vs. United States, 11 Wall. 356	22 & 23
Hays vs. Hill, 23 Wash. 735	34
Houseman vs. Gerard, 81 Pa. St. 256	18
Iron Silver Mining Co. vs. Reynolds, 124 U. S. 374	31
Maxwell Land Grant Case, 121 U. S. 325	29
McCaskill vs. United States, 216 U. S. 506	41
Quinby vs. Conlan, 14 Otto 420	40
Ross vs. Day, U. S. Adv. Ops. 1913, p. 233	37
Storey on Agency	18
United States vs. California Land Co., 148 U. S. 31	21
United States vs. Clark, 200 U. S. 601	12, 23, 29, 32 & 34
United States vs. Detroit Timber & Lbr. Co., 124 Fed. 393, 200 U. S. 321	12 & 27
United States vs. Iron Silver Mining Co., 128 U. S. 673	29 & 44
United States vs. Marshall Mining Co., 129 U. S. 579	44
United States vs. Mills, 169 Fed. 686	12, 28 & 29
United States vs. Minor, 114 U. S. 233	39
United States vs. San Jacinto Tin Co., 125 U. S. 273	46
United States vs. Stinson, 197 U. S. 200	11 & 29
United States vs. Throckmorton, 98 U. S. 61	45
Vance vs. Burbank, 11 Otto 514	40

In the Supreme Court of the United States

OCTOBER TERM, 1913.

WASHINGTON SECURITIES COMPANY, *Appellant*, *vs.* THE UNITED STATES, *Appellee*.	No. 367.

Appeal From the United States Circuit Court of Appeals for the Ninth Circuit.

Brief for the Appellant

STATEMENT.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Ninth Circuit, affirming a decree of the Circuit Court of the United States for the Western District of Washington, Northern Division, cancelling certain homestead patents.

The government brought this suit in equity to cancel certain homestead patents issued for four different tracts of land, jointly comprising all of

section thirty-four (34), township thirty-two (32) north of range seven (7) east of the Willamette Meridian.

The patents were issued as follows:

To Zachariah Turner, patent dated November 2, 1904, to east half of east half (E. ½ E. ½) of said section.

To Odin A. Olsen, patent dated May 6, 1903, to northwest quarter (N. W. ¼) of said section.

To Robert L. Barbee, patent dated December 12, 1904, to southwest quarter (S. W. ¼) of said section.

To Thos. B. Forsyth, patent dated August 3, 1904, to west half of northeast quarter (W. ½ N. E. ¼) and west half of southeast quarter (W. ½ S. E. ¼) of said section.

Odin A. Olsen conveyed an undivided one-half interest in his quarter section to Thos. G. Spraight on February 24, 1905, and they both thereafter, on February 24, 1906, conveyed the whole to C. J. Smith.

Thos. B. Forsyth conveyed his quarter to C. J. Smith on May 4, 1906, and Turner and Barbee conveyed theirs to him on October 10, 1906.

Smith in turn conveyed the various quarters to appellant, the Turner, Olsen and Barbee tracts on October 10, 1906, and the Forsyth on May 14, 1906.

The Government's theory is that the patents were procured by fraud consisting of the alleged fact that the patentees homesteaded the land as agricultural and timber land with knowledge that it contained valuable deposits of coal, and that they swore falsely when they made the non-mineral affidavit required by the rules and regulations of the General Land Office; that, as a consequense, the patents were void and subject to cancellation, even as against the appellant.

It is not charged that the officers of the Department participated in the alleged fraud, or that they connived with the homesteaders in issuing the patents. Nor is it claimed or proved that appellant, its officers or agents, had anything to do with the procurement of the patents, or that the patentees were its representatives in this respect. To the contrary, the only thing with which appellant is sought to be charged is the purchase of the land with knowledge of the circumstances when it bought from the several patentees.

The record shows that the homestead claims

were disputed by other claimants, and that the land office refused thirty-two hundred dollars ($3,200.00), which was tendered for one of the quarter sections as coal land.

As the defense of *bona fide* purchaser is perfect in an action of this sort, and as the decision of the Department is final upon a disputed question of fact, we shall divide our argument into two general propositions incorporating therein such collateral points as may arise and become pertinent, as follows:

FIRST: *The fraud, if any, of the patentees has not been brought home to the appellant with that degree of precision required by law, and the Government has failed to establish by clear and satisfactory evidence that the appellant was not a bona fide purchaser of the disputed property.*

SECOND: *The decision of the Land Office as to the character of this land was in the nature of a judicial determination of the matters in dispute and finally binding upon the Government.*

ASSIGNMENT OF ERRORS.

"That in the record and proceedings herein there is manifest error, and that the United States

Circuit Court of Appeals for the Ninth Circuit erred in this, to-wit:

I.

"In affirming and not reversing the decision and decree of the United States Circuit Court for the Western District of Washington, Northern Division.

II.

"In holding and deciding that the decision of the Land Department in rejecting the claims of the mineral claimants was not a final adjudication of that question.

III.

"In holding and deciding that the appellant was chargeable with any knowledge obtained or acquired by Mr. C. J. Smith prior to his employment by or association with this appellant.

IV.

"In holding and deciding that C. J. Smith had knowledge of the mineral character of the land at or prior to the date of the homestead entries, or at the time of the issuance of patents therefor.

V.

"In holding and deciding that section thirty-four (34), township twenty-two (22) north of range seven (7) east of the Willamette Meridian, was known coal land at or prior to the date of the homestead entries of Zachariah Turner, Odin A. Olsen, Robert L. Barbee and Thomas B. Forsyth.

VI.

"In holding and deciding that section thirty-four (34), township twenty-two (22) north of range seven (7) east of the Willamette Meridian, was known coal land at the dates of the issuance of patents to said Zachariah Turner, Odin A. Olsen, Robert L. Barbee and Thomas B. Forsyth.

VII.

"In holding and deciding that section thirty-four (34), township twenty-two (22) north of range seven (7) east of the Willamette Meridian, was known coal land at and prior to the date of purchase of said section by the defendant above named.

VIII.

"In holding and deciding that the east half (E. ½) of the east half (E. ½) of section thirty-four (34), township twenty-two (22) north of range seven (7) east of the Millamette Meridian, was known coal land at and prior to the date of the homestead entry thereon by Zachariah Turner.

IX.

"In holding and deciding that the northwest quarter (N. W. ¼) of section thirty-four (34), township twenty-two (22) north of range seven (7) east of the Willamette Meridian, was known coal land at and prior to the date of the homestead entry thereon of Odin A. Olsen.

X.

"In holding and deciding that the southwest quarter (S. W. ¼) of section thirty-four (34),

township twenty-two (22) north of range seven (7) east of the Willamette Meridian, was known coal land at and prior to the date of the homestead entry thereon of Robert L. Barbee.

XI.

"In holding and deciding that the west half (W. ½) of the northeast quarter (N. E. ¼) and the west half (W. ½) of the southeast quarter (S. E. ¼) of section thirty-four (34), township twenty-two (22) north of range seven (7) east of the Willamette Meridian, was known coal land at and prior to the date of the homestead entry thereon of Thomas B. Forsyth.

XII.

"In holding and deciding that the east half (E. ½) of the east half (E. ½) of section thirty-four (34), Township twenty-two (22) north of range seven (7) east of the Willamette Meridian, was known coal land at and prior to the second day of November, 1904.

XIII.

"In holding and deciding that the northwest quarter (N. W. ¼) of section thirty-four (34), township twenty-two (22) north of range seven (7) east of the Willamette Meridian, was known coal land at and prior to the first day of November, 1904.

XIV.

"In holding and deciding that the southwest quarter (S. W. ¼) of section thirty-four (34),

township twenty-two (22) north of range seven (7) east of the Willamette Meridian, was known coal land at and prior to the twelfth day of December, 1904.

XV.

"In holding and deciding that the west half (W. ½) of the northeast quarter (N. E. ¼) and the west half (W. ½) of the southeast quarter (S. E. ¼) of section thirty-four (34), Township twenty-two (22) north of range seven (7) east of the Willamette Meridian, was known coal land at and prior to the third day of August, 1907.

XVI.

"In holding and deciding that the several patentees entered into possession of said section thirty-four (34), township twenty-two (22) north of range seven (7) east of the Willamette Meridian, and excluded therefrom the 'coal syndicate' by force and threats of violence.

XVII.

"In holding and deciding that there was no formal contest between the 'syndicate' and the patentees, and that the Land Office, without permitting the introduction of evidence arbitrarily rejected the coal claim and that no appeal was taken.

XVIII.

"In holding and finding that the defendant, at the time of purchasing the land, had actual knowledge that when the commutation entries were al-

lowed the land was known to be coal land and should have been sold as coal land only, to purchasers authorized by law to make entry of coal land in limited quantities as prescribed by law, and knew that the officers of the land office had, contrary to their duty, allowed the entries and issued patents as if the land were rightfully classed as non-mineral land, and with that knowledge purchased the land from patentees, paying therefor what appeared to be a fair price for undeveloped coal land.

XIX.

"In holding and deciding that the defendant was not a bona fide purchaser of section thirty-four (34), township twenty-two (22) north of range seven (7) east of the Willamette Meridian, but acquired it with knowledge of the facts tainting the title.

XX.

"In holding and decreeing that the patents to section thirty-four (34), township twenty-two (22) north of range seven (7) east of the Willamette Meridian, be cancelled, annulled and set aside, and that the defendant and all persons claiming under it be foreclosed of all interest, right or title to said section, and that the complainant is the legal and equitable owner of said lands and confirming and quieting its title thereto.

XXI.

"In not entering a decree dismissing complainant's complaint, and affirming the United States Circuit Court for the Western District of Washington, Northern Division.

XXII.

"In taxing the costs of this action against the defendant and in not taxing the costs thereof against the complainant."

ARGUMENT.

I.

We concede, as a preface to our argument, that this court has announced with tiresome repetition that it will not attempt to weigh conflicting testimony when the two lower courts have agreed upon the facts.

On the other hand it is equally well settled that where the findings of the lower courts are based wholly upon flimsy or insufficient testimony, or are unsupported by any substantial testimony whatever, they will be set aside.

> "* * * These propositions we have often affirmed. At the same time there has always been recognized the right and the duty of this court to examine the record, and if it finds that the conclusions are wholly unwarranted by the testimony it will set the verdict or report aside and direct a re-examination. * * *"
>
> *Beyer vs. Le Fevre*, 186 U. S. 114-119 (46 L. Ed. 1080-1084).

This rule applies to the Government as well as

to an individual; and its application is doubly essential in a case of this character, where the very gravamen of the suit is fraud and its object the cancellation of a patent.

> "The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. 'It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.' *Maxwell Land Grant Case, supra,* p. 381; *United States vs. Iron Silver Mining Co.,* 128 U. S. 673, 677; *United States vs. Des Moines, etc. Company, supra,* p. 541."
>
> *United States vs. Stinson,* 197 U. S. 200.

It follows that we start with the proposition that the conclusions of the lower court on the question of knowledge possessed by Mr. Smith and imputable to the appellant, are here wholly unsupported by competent evidence, or, at best, are based entirely upon a most flimsy showing, conjecture, inference and speculation.

It will be remembered that this action is grounded in fraud—the fraud of the patentees, and not the fraud of the appellant, its agents or servants; and, in order to prevail, the Government is

obliged to show (a) that the appellant participated therein, or (b) that it bought the property with knowledge thereof, and consequently was not an innocent, *bona fide* purchaser for value.

In either event, as fraud is never presumed, it is incumbent upon the Government to establish it by clear, unequivocal and convincing testimony.

United States vs. Mills et al., 169 Fed. 686;

United States vs. Detroit Tbr. & Lbr. Co., 124 Fed. 393, 200 U. S. 321, 50 L. Ed. 499;

United States vs. Clark, 200 U. S. 601.

With this rule in mind, we shall discuss the evidence as briefly as the circumstances permit. Mr. C. J. Smith is the medium through whom the appellant is sought to be charged—the anchor to which the Government's case is tied—and the following is, we believe, all the testimony which shows, or tends to show, that Mr. Smith had any knowledge of the character of the land until it was brought to his attention after the patents had been issued, or which can in any way be taken as imputing his individual knowledge to the appellant as a corporation.

In 1882, F. H. Whitworth, E. M. Smithers, Al. Evans, three other men and an Indian, were prospecting upon the land.

Shortly thereafter, a syndicate was formed of E. M. Smithers, J. M. Coleman, James Williams and Mr. Whitworth. Some time later Mr. Howard, a representative of the Oregon Improvement Company, became interested in the prospect (R. p. 78). Subsequently Mr. Howard, ostensibly as an individual, but in reality as an agent of the Oregon Improvement Company, acquired a one-third interest in the prospect. This syndicate, whose membership changed from time to time during a period of from ten to fifteen years, expended in prospecting the section something over eight thousand dollars (R. pp. 78-79). All this occurred long prior to the time when Mr. Smith became associated with the Oregon Improvement Company, which did not occur until probably 1890. Thereafter he became associated with the Oregon Improvement Company, either as general manager or as receiver, until 1898 (R. p. 98), but he never became a member of the syndicate in any manner whatever.

Under date of November 8, 1890, Mr. Howard wrote Mr. Smith regarding the land, and stated among other things that he had received conflicting reports, "some favorable, some otherwise." (Complainant's Exhibit "F," R. p. 180.) This was followed by a letter, dated December 8, 1890, in which

he says: "here is an expense of the company's which was incurred prior to the appointment of the receiver" (Complainant's Exhibit "G"; R. p. 241). This letter evidently prompted complainant's Exhibit "H" (R. p. 182), which is as follows:

"Seattle, Washington, December 9, 1890.

"H. W. McNeill, Esq.,
Seattle, Wash.

"Dear Sir:

"Please let me know what you think of Section 34 marked on the map in the name of J. L. Howard. Is there anything in it, or have you ever made any examination of it?

"Yours truly,
"C. J. Smith,
"General Manager."

The foregoing, in the light of the letter last quoted, instead of showing that Mr. Smith knew the character of this land, to the contrary conclusively demonstrates that he did not.

The letter last quoted is followed seven years later by a letter from witness Whitworth to Mr. Howard, wherein he offers to sell his own and a Mr. McGuire's interest, at a low price, and enclosed a bill for expenses in connection with the land for two years preceding. (Complainant's Exhibit "I"; R. p. 183.) This bill charges Mr. Howard with $51.50, being his proportion of the total

expense. The next instrument is an Oregon Improvement Company voucher in favor of Mr. Howard for the amount of this bill, approved by Mr. Smith, and stamped—"Paid January 30, 1897" (Complainant's Exhibit "J"; R. p. 184).

The foregoing is, we believe, a full account of all the testimony tending to show that Mr. Smith had any knowledge of the character of this land, until in the Olsen case, three and in the others two years after the patents were issued.

It will be remembered that the Olsen patent was issued in 1903, and the others in 1904, and that the Olsen tract was purchased by Mr. Smith about three years after patent, and the others about two.

The appellant is a corporation organized under the laws of the State of Washington; and, although it was about to be formed, was not organized in 1906, when Mr. Smith bought the disputed property from the several patentees (R. p. 99). This means that the Olsen patent was issued at least three, and the others two, years before the appellant came into existence. We concede, however, that in purchasing the property, Mr. Smith did so with the intention of transferring it to appellant when organized, and that he possessed such authority in that respect as an unborn corporation could confer.

Assuming without conceding at this point that, at the time of the purchase of the property, Mr. Smith knew of the character of the land, the question which at once presents itself is—what effect would that knowledge have upon the appellant as a *bona fide* purchaser? In other words, can this appellant, which was not organized until 1906, be held accountable for a fraud (if there was any fraud) perpetrated upon the Government by the patentees in making false non-mineral affidavits, as a prerequisite to the issuance of their patents? From the very nature of things, the fraud, if any, must have been committed prior and not subsequent to the date of the patents, and we are confronted with the proposition as to whether or not any knowledge which Mr. Smith may have had of the fraud could be imputed to the company. As said before, there is nothing in the record which in any way tends to show, nor is there any claim made, that Mr. Smith aided any of the homesteaders in obtaining their patents, nor is it shown that he knew how they were acquired. The utmost which can be drawn from the testimony quoted, and from the entire record, is that Mr. Smith knew, or at some time in the remote past had knowledge of the fact, that some persons had prospected upon this section for coal.

We take the general rule to be that knowledge acquired by an agent, outside the scope of his employment, is not imputable to the principal; and while this rule has been qualified in several instances, we feel that in this case it should be applied in the strictest sense, as there is not one word in the record which shows that the appellant did anything but pay good money for the property, or that it had any actual knowledge through Mr. Smith, or anyone else, that the homesteaders had committed a fraud upon the Government. To the contrary, it had the right to rely upon the validity of the patents and to proceed in the belief that the entrymen and the Department officials had done their duty and performed their obligations as all men in law are presumed to have done until the contrary is shown.

Judge Sharswood, in discussing the doctrine of imputed knowledge, said in a celebrated case that:

> "The true reason of the limitation is a technical one, that it is only during agency that the agent represents and stands in the shoes of his principal. Notice to him is then notice to his principal. Notice to him twenty-four hours before the relation commenced is no more notice than twenty-four hours after it had ceased would be."

Houseman vs. Gerard, etc., 81 Pa. St. 256; *Story on Agency*, Sec. 140.

"A corporation can have no agents until it is brought into existence."

Davis, etc., Co. vs. Davis, etc., Co., 20 Fed. 699.

"Any knowledge or notice which an agent may have received while acting for another party or association, or which any individual member of the corporation may have obtained prior to the constitution of the corporate body, most certainly would not, as a matter of law, by implication, be carried over and imputed to the corporation, simply because one or more of the members of a previously existing concern may have become officers or stockholders of the corporation, nor because such agent afterwards became an agent for the corporation."

Brennan et al. vs. Emery-Bird-Thayer Dry Goods Co., 99 Fed. 971, 972.

Passing this point and turning again to the evidence, we find that Mr. Smith had heard nothing of this land from the time he left the Oregon Improvement Company in 1898 until he was approached by Mr. Brooks or Braggs in 1906, who endeavored to sell him the property. What occurred then is well described by Mr. Smith, and we quote his testimony as follows:

"A man by the name of Braggs came to me and told me he had some coal land, wanted

to know if I was interested in coal, and I asked him where the land was. He told me it was in section 34, township 22, seven, I think it was, and I told him that I was not, that I didn't believe that I cared to be interested, and he asked me if there was anybody that he could obtain as a purchaser, that he had an option on the land. I referred him to C. R. Collins, who at that time was hunting for some coal land with the expectation of getting coal that would be adaptable for gas purposes. He had some negotiations with Mr. Collins and Mr. Collins came to me and said that he would take it if I would take an interest, which I declined to do; and Mr. Collins took it up with some people in the east, and, not obtaining the necessary funds, told Mr. Braggs that he was unable to carry out his plans; and Braggs came back to me again, and in the meantime the Washington Securities Company was about to be formed and their stock was then being subscribed, and I referred Mr. Braggs to the Securities Company. He had a talk with Mr. Clise, who expected to be the president of the company and who was promoting it—forming it, and Mr. Clise discussed the question with me and Mr. Braggs, and I told him that—I gave him the name of an engineer—mining engineer, that would exploit the land, that is, would make examination, and that I knew nothing personally about the land myself, but would rely upon a report that this man would make; and, at my suggestion, the man was employed to go there and look the land over. After he had looked it over the matter of purchase was taken up between myself and Mr. Braggs and an option was taken for a sufficient length of time to enable us to verify the report of the

> engineer, and, upon the verification of those reports and the abstract of title, the land was purchased." (R. p. 100.)

This statement is practically reiterated on page 117 of the record.

The foregoing clearly demonstrates that the report of the engineer sent to examine the property was the thing which induced the company to buy, and further shows that it was relying upon that report and not upon anything which Mr. Smith may or may not have known about the land.

After receiving a favorable report from its engineer, the company very naturally required an abstract of title, which was referred to its attorney, Mr. H. R. Clise, for examination, who, by the way, was not the Mr. Clise to whom Mr. Smith referred in the testimony just quoted.

There is not a scintilla of evidence to show that Mr. Smith knew the contents of this abstract, or whether the patents issued to the entrymen were to agricultural or mineral land. The record also fails utterly to show that the examining attorney knew the character of the land, and, if he did not, he was unquestionably entitled to assume that the patents were properly and lawfully issued.

U. S. vs. Calif. etc. Land Co., 148 U. S. 31-44, 45 (37 L. Ed. 354).

From this it will be seen that, so far as appellant is concerned, all the information it received came from the engineer's report that the land was a good coal prospect, and from its attorney, who reported that the title was good in the several patentees.

In this connection, Mr. Smith said that he did not know the land had been taken up as a homestead (R. p. 117), and he further said that he had no recollection of the character of the land, and had forgotten all about it until it was brought to his attention by Mr. Braggs or Mr. Brooks (R. pp. 116, 117, 118, 119 and 120).

In *Harrington vs. United States*, the question of "*how far a purchaser is affected by notice of prior liens, trusts, or frauds, by the knowledge of his agent who effects the purchase*" was directly before this court, and the doctrine of imputed knowledge discussed at length. The court, per Mr. Justice Bradley, carefully reviewed the authorities and concluded:

> (1) That the presumption of knowledge depends upon the lapse of time between the purchase and the time when the knowledge was acquired by the agent.

(2) That the principal was not bound by such knowledge unless present to the agent's mind at the time of the purchase.

(3) That there must be clear and satisfactory proof that it was so present and that if the agent acquired the knowledge at the time he effects the purchase no question can be raised as to his having it at the time.

As stated by the court:

"If he acquire the knowledge when he effects the purchase, no question can arise as to his having it at that time; if he acquired it previous to the purchase, the presumption that he still retains it, and has it present to his mind, will depend on the lapse of time and other circumstances. Knowledge communicated to the principal himself he is bound to recollect, *but he is not bound by knowledge communicated to his agent, unless it is present to the agent's mind at the time of effecting the purchase. Clear and satisfactory proof that it was so present seems to be the only restriction required by the English rule as now understood.*"

Harrington vs. U. S., 11 Wall. 356 (20 L. Ed. 167).

Can anyone fairly say from reading the foregoing testimony that the government has established by "*clear and satisfactory proof*" that the knowledge which it is alleged, but not proved, that Mr. Smith acquired when he signed a voucher for $51.50 in 1897 was present to his mind when he introduced Mr. Brooks to the appellant's president? The only

direct proof upon this point is Mr. Smith's own testimony, and he flatly denies any recollection of the circumstances which occurred while he was receiver of the Oregon Improvement Company; and there is certainly nothing in the record which clearly or satisfactorily shows that he perjured himself in this regard. In the absence of direct proof, we are forced into the realm of conjecture and speculation, which certainly does not meet the requirements of the *Harrington case*, wherein it was further said:

> "* * * the presumption that he still retains it, and has it present to his mind, will depend on the *lapse of time* and other circumstances,"

and that *clear and satisfactory proof* that it was so present is necessary.

It certainly cannot be presumed as a matter of law that Mr. Smith recalled the meager circumstances connected with this land which the record shows to have occurred nearly sixteen years ago, and it is only reasonable to assume that he forgot them, or at least that they were not so clearly present to his mind as to charge the appellant with them by invoking the doctrine of imputed knowledge. This seems especially true in view of his direct denial.

United States vs. Clark, 200 U. S. 601.

To review the testimony:

We have two letters written to Mr. Smith nearly sixteen years ago, telling him that the company for which he was then receiver had a one-third interest in a prospecting venture, upon the land in suit, and asking him to find out something about it. Next we have a letter written by Mr. Smith in 1890 to H. W. McNeill, wherein he asks if there is anything in the venture, and the record is singularly silent as to the result of this inquiry. This is followed by an offer of the chief witness, Mr. F. W. Whitworth, to sell his interest in the land at a low figure, and then comes a voucher approved by Mr. Smith as receiver of the Oregon Improvement Company for $51.50 in favor of Mr. Howard for charges connected with the prospecting adventure. None of these things show that he remembered the circumstances after the lapse of nearly sixteen years, and it is only fair to assume that he told the truth when he said that he had no recollection of them.

The letter to Mr. McNeill is proof positive that he knew nothing about the land at the time it was written, and Mr. Whitworth's offer to sell tends strongly to establish the fact that he thought but little of the property as a mining proposition. Add

to this the fact that none of the prospectors, during all of the years they worked upon the land, thought it sufficiently valuable to justify them in developing their prospect, and the further fact that the Land Office permitted the property to be homesteaded, and the conclusion seems inevitable that that office was justified in its conclusion that the land was more valuable for agriculture than as mining property. In any event, as said before, there is nothing in the record which shows that Mr. Smith personally knew the method by which the entrymen acquired the land, or that Mr. H. R. Clise, the company's attorney, knew its character, or that they had made a false entry or defrauded the government in any other particular, or that he was not justified in relying upon the integrity of the patent. It will be remembered that no claim is made that Mr. Smith, the company, its agents or servants, connived with or assisted the patentees in homesteading the land, or that they even knew that patents had issued until Mr. Braggs or Brooks called upon Mr. Smith. It is not shown or even suggested that Mr. Smith knew the source or character of their title, or whether they entered upon the land under the mining or homestead laws. On the contrary, it is proved and unquestioned that Mr. H. R. Clise

examined the title, found it apparently perfect, and so reported to appellant and to Mr. Smith. It is not shown that Mr. Smith recalled the circumstances which were brought to his knowledge some sixteen years before while acting as receiver of the Oregon Improvement Company, or that, if he had this knowledge, he ever communicated it to the appellant company. It is not shown that appellant was not a *bona fide* purchaser for value, and as such entitled to rely upon the validity of the patents. It is not shown that the Department officials were not warranted in making the finding which they did, relative to the character of this land, and that the Government did not have full knowledge of what they did.

All of the cases are at one on the proposition that the cancellation of an executed contract is an exercise of the most extraordinary power of a court of equity, and one which should never be used for an alleged fraud unless it is established by clear, unequivocal and convincing testimony. It cannot be done upon a bare preponderance of evidence; and fraud is never presumed, but the burden of producing proof, and of establishing it, is upon the government, from which it is not relieved, although

the proposition to be established is of a negative nature.

> "This rule applies with increased force where the Government seeks to cancel a patent which has been issued by it. * * * The facts established, as a whole, should be inconsistent and irreconcilable with the integrity of the patent or the integrity and legality of the actions of the defendants charged with the fraudulent entries and should be so satisfactory as to make it clear to the court that the land was procured by fraud."
>
> *United States vs. Detroit Timber & Lbr. Co.*, 124 Fed. 393; affirmed in 200 U. S. 321 (50 L. Ed. 499).

Both of these opinions were most carefully considered and support our contentions fully.

The decisions were reviewed and quoted in *United States vs. Mills*, wherein it is said:

> "Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear. *The Atlantic Delaine Co. vs. James, adminx., etc.*, 94 U. S. 207, 24 L. Ed. 112.
>
> "A suit by the Government to set aside or annul a patent issued by it should be sustained only when the allegations on which it is attempted are clearly stated and fully sustained by proof. *U. S. vs. Stinson et al.*, 197 U. S. 203, 25 Sup. Ct. 426, 49 L. Ed. 724; *U. S. vs. Budd*,

144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384.

"In the case of the *United States vs. De-Moines & Co.*, 142 U. S. 541, 12 Sup. Ct. 316, 35 L. Ed. 1099, the court said: 'Muniments of title issued by the Government are not to be lightly destroyed.'

"In a suit by the United States to cancel a patent of public land, the burden of producing proof and establishing the fraud is on the government, from which it is not relieved, although the proposition which it is bound to establish may be of a negative nature. *Colorado Coal & Iron Co. vs. U. S.*, 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182.

"The testimony on which this is done must be clear, unequivocal and convincing. It cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. *Maxwell Land Grant Cases*, 121 U. S. 325, 7 Sup. Ct. 1015, 30 L. Ed. 949; *United States vs. San Jacinto Tin Co.*, 125 U. S. 273, 8 Sup. Ct. 850, 31 L. Ed. 747.

"Fraud is never presumed, and it devolves upon him who alleges fraud to show the same by satisfactory proof." *Walker vs. Collins*, 59 Fed. 70, 8 C. C. A. 1.

"In the case of *United States vs. Detroit Timber & Lumber Co.* (C. C.), 124 Fed. 393, the court said:

"This rule applies witht increased force where the Government seeks to cancel a patent which has been issued by it. * * * The facts established, as a whole, should be inconsistent and irreconcilable with the integrity of the patent or the integrity and legality of the actions of the defendants charged with the

fraudulent entries, and should be so satisfactory as to make it clear to the court that the land was procured by fraud."

United States vs. Mills, et al., 169 Fed. 686.

"We take the general doctrine to be that, when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done *must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.* If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, *how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidence of title emanating from the government of the United States under its official seal.*"

Maxwell Land Grant Case, 121 U. S. 325, 381 (30 L. Ed. 949).

United States vs. Iron Silver Mining Co., 128 U. S. 673, 674 (32 L. Ed. 571).

Colorado Coal & Iron Co. vs. United States, 123 U. S. 307 (31 L. Ed. 182).

United States vs. Stinson, 197 U. S. 200, 204 (49 L. Ed. 724).

United States vs. Clark, 200 U. S. 601 (50 L. Ed. 613).

We are curious to know where the Government has sustained the burden cast upon it under these authorities; or where it has succeeded in show-

ing that the land was known to *be* mineral land. There is unquestionably testimony, and a good deal of it of a hearsay character, which tends to show that the property was known as mineral land, but this does not satisfy the statutes of the United States or the decisions of this court construing them, as the land must be known to be minerally valuable as required by law at the date of the patent. And none of them testified that there were any known mines upon the land or anything more than a mere prospect, which might or might not prove valuable.

> "There is a marked unanimity of opinion among the authorities that, to overcome the presumption that a patent to public lands was issued upon sufficient evidence, clear and convincing proof must be produced, and, in the consideration of the mineral character of the land, not only must it satisfactorily appear that it was known mineral land other than coal or iron at and prior to the issuance of the patent, but it must be more valuable for mineral than for agricultural or other purposes. *Deffebach vs. Hawke*, 115 U. S. 404, 6 Sup. Ct. 95; *Iron Silver Min. Co. vs. Mike & Starr Gold & Silver Min. Co.*, 143 U. S. 394, 430, 12 Sup. Ct. 543; *U. S. vs. King*, 27 C. C. A. 509, 83 Fed. 188; *Alford vs. Barnum*, 45 Cal. 482; *U. S. vs. Iron Silver Min. Co.*, 128 U. S. 673, 9 Sup. Ct. 195, *U. S. vs. Marshall Silver Min. Co.*, 129 U. S. 588, 9 Sup. Ct. 343. 'If upon the premises at that time (when title was acquired) there were not actual "known mines" capable of being profitably worked for their product, so as to

make the land more valuable for mining than for agriculture, a title to them, acquired under the pre-emption act, cannot be successfully assailed.'"

Colorado Coal & Iron Co. vs. U. S., 123 U. S. 328 8 Sup. Ct. 131.

United States vs. Central Pac. R. Co., 93 Fed. Rep. 871-873;

Deffeback vs. Hawke, 115 U. S. 392, 404, 405 (29 L. Ed. 423);

Davis, Admr., vs. Weibold, 139 U. S. 507, 521, 524 (35 L. Ed. 238);

Downer vs. Richards, 151 U. S. 658, 663 (38 L. Ed. 315);

Colo. Coal & Iron Co. vs. U. S., 123 U. S. 307, 327 (31 L. Ed. 182).

There must be knowledge and not mere belief of the mineral character of the land.

Iron Silver Mining Co. vs. Reynolds, 124 U. S. 374, 383-384 (318 L. Ed. 466).

The rule is less liberal in favor of the mineral character of land where the contest is between an agricultural claimant and a mineral claimant than where it is between two mineral claimants.

Christman vs. Miller, 197 U. S. 313, 323 (49 L. Ed. 770).

The testimony of all of the Government's witnesses was of a hearsay nature, and most of them

admitted that a portion of the land was valuable for agricultural purposes.

As further bearing upon the character of this land, we particularly call the court's attention to the testimony of Messrs. Brockway, Beal, C. M. and H. Harrington, appearing at pages 109 to 114 of the record, all to the effect that section 34 is exceptionally good agricultural land, and is well timbered. Their testimony is further illustrated and supported by appellant's Exhibits 1, 2, 3, 4, 5, 6, 7 and 8 (R. pp. 245 to 259 inclusive).

We feel that a perusal of this testimony will convince your Honors that there is nothing which would require Mr. Smith or the company's attorney to question the integrity of the patents. Of course, as put by Mr. Justice Holmes in *United States vs. Clark, supra*, 200 U. S. 601, "when suspicion is suggested it is easily entertained." But we do not believe there is any rule of law which required Mr. Smith or the appellant to hunt for "*grounds of doubt.*"

II.

The Decision of the Land Office as to the Character of This Land Is Final.

This suit, while perhaps not barred by any

statute of limitation, at least shows that the Government slept upon its rights for several years until the perpetrators of the alleged wrongs had cleared their skirts and induced the appellant to part with its money for the property. By failing to exercise ordinary diligence, it indirectly induced the appellant to assume the integrity of the patents, the good faith of the department agents and that the Government was satisfied with the bargain it made when it issued, and for several years failed to attack so solemn a muniment of title as its patent. Instead of attempting to impeach the patents immediately, the Government stood idly by, and by its unexplained delay confirmed their validity, for we have all been taught since childhood to believe that silence means consent.

Without tendering the purchase price or attempting to explain its *laches*, it now seeks through a court of equity, with the aid of a disgruntled tattler whose claim was rejected by the Department, to impute fraud where none exists, and to rescind therefore contracts which were made and recognized by it for several years. Without this unnecessary and unexplained inaction, we were entitled to assume that the patents were lawfully issued and procured. "*Omnia presumuntur rite et solemniter esse*

acta, donec probetur in contrarium." With it the presumption became conclusive, especially when applied to the officers of the land department as:

> "The law constantly presumes that public officers charged with the performance of official duty have not neglected the same."
> *Hays vs. Hill*, 23 Wash. 735-740;
> *United States vs. Clark*, 200 U. S. 601.

Strong as this defense should be in the eyes of a court of equity, we are not compelled to rely upon it entirely, as the departmental adjudication is not only conclusively presumptive of good faith, but, as a *quasi* judicial decision, is finally binding upon the courts. Mr. Sidney Williams, a lawyer, and one of the Government's star witnesses, testified as follows:

> A. When I made the filing and made the tender of the money, I filed alone at that time.
>
> Q. What year was that?
>
> A. I don't remember the year. It was about—
>
> Q. (Interrupting:) '96 or '7?
>
> A. I think it was, about; I don't know; the records show the filing. I don't remember.
>
> Q. It was shortly after the land was surveyed, wasn't it?
>
> A. I don't remember just exactly when it was, but the record shows. I made my filing and I made my tender of the money to the officer here.

Q. Any way you filed on it before—what was the condition, at what stage, were these homesteaders in when you filed?

A. They had just filed.

Q. They had just filed?

A. They had filed on it also, but hadn't made their final proof.

Q. Did you keep your filing good?

A. Yes, sir; I made a tender of the $3,200 to the Land Office.

Q. Then you contested their filing; did you?

A. No; it didn't go any further. They refused to accept my money—the Land Office here; it was more valuable for other purposes, and gave me back my money.

Q. And what, if any, showing did you make to substantiate your filing?

A. I made the same talk I have made here about the coal being there.

Q. In what way did you make that showing?

A. I had witnesses.

Q. That was before the office here?

A. Yes, sir.

Q. And, as the result of that showing, they refused to accept your tender?

A. Returned—

Q. (Interrupting.) And turned down your filing?

A. Yes, sir. (R. pp. 52-53.)

This is the same testimony quoted by the Circuit Court of Appeals in its opinion at page 202, and which they denominate as "one of the peculiar features to which reference has been made". Its peculiarity, to our minds, consists of the fact that the Government should even attempt to question the validity of the patents in the face of the decision of the Land Office after the dubious character of the land had been so fully presented. The Circuit Court of Appeals seems to have dismissed the point upon the theory that there was no formal contest. In reaching this conclusion, it evidently overlooked the fact that Mr. Williams stated that entryman Forsyth contested his coal entry (R. p. 59). We especially commend all of Mr. Williams' testimony to your Honor's consideration (R. pp. 49 to 59), and believe that it will show that the Department was fully apprised of the character of this land and familiar with the situation when it made the ruling which it did.

We do not understand that it is the practice of this court, in the exercise of its great appellate jurisdiction, to go out of its way to decide facts properly for the consideration of another branch of the Government, or to vacate patents upon such microscopic equities as are presented here. (*Ross*

vs. Day, U. S. Adv. Ops. 1913, p. 233; decided Jan. 5, 1914.)

If so, a patent is a mighty slender reed upon which to base a title; and this court has repeatedly held, in sustaining rulings of the Interstate Commerce Commission, that, while it might have reached a different conclusion upon the same evidence, it will not disturb the findings so long as there is any substantial testimony to sustain them. In the first place, as we understand it, the Department is not bound by any strict rules of evidence; it may use its discretion and send its engineers and surveyors upon the disputed property, or otherwise determine the matters in dispute by any means at hand. The procedure before a court and such a tribunal are essentially and necessarily different.

Judge Hanford who tried the case in the Circuit Court, said:

> "The evidence contains no explanation of the conduct of the land office officials in allowing the homestead entries in preference to the coal claims, and accepting $400.00 for a quarter section rather than $3,200.00. No complete transcript of the land office records affecting the land has been offered in evidence and it must be *inferred from lack of evidence to the contrary, that there was no formal contest between the syndicate and the patentees, that without permitting the introduction of evidence*

the coal claim was arbitrarily rejected and no appeal was taken."

Judge Hanford's opinion (R. p. 185).

The law, for centuries, has been more charitable, and the presumption has ever been in favor of fair dealing and against an arbitrary, capricious or unwarranted act. It is singular that if the action was, as Judge Hanford infers, arbitrary, that the contestant, an attorney at law and familiar with his rights, did not exercise his remedy and adjust the wrong by appeal. For all the record shows, this could have been done; but Judge Hanford, in the fullest enjoyment of his right to draw unwarranted inferences, has assumed the contrary.

It is not only possible but probable, and the presumption should be indulged, that when put upon inquiry, the Department authorities made an independent investigation and satisfied themselves as to the merits or demerits of the respective claims. Otherwise why did not the Government, having undertaken to prove fraud, do so by these officials whose word would have been the highest proof obtainable? The answer is manifest, and the chances ten to one that they would have testified that they had done their duty and acted upon proper information and mature deliberation. In any event, the

burden is not upon us to prove them good until they are proved bad by something more damning than an erroneous presumption.

This court has repeatedly held that a departmental decision is binding upon the courts as to any disputed fact presented. The decisions relating to the finality of such rulings are divided into two classes, one where the facts are disputed, or, what the court is pleased to term—"an adversary proceeding", and the other where the proceedings are *ex parte*.

The one class, such as *United States vs. Minor*, 114 U. S. 233 (29 L. Ed. 110), hold that the Department's decision does not estop the Government from cancelling patents which have issued upon fraudulent *ex parte* testimony in cases where there are no conflicting claims. The other holding that, where a departmental finding is made upon any disputed fact, it is not only binding upon the parties to the controversy, but upon the Government and all other persons as well.

The distinction, although clear and well recognized, has been sometimes ignored by other courts, and we therefore anticipate respondent's argument upon it.

39

The rule, as we take it, is this:

Where the proceedings are wholly *ex parte*, and the Government compelled to rely on the evidence of the party charged with fraud, the Department's finding of a particular fact or circumstance is not binding or conclusive. On the other hand, where there is a disputed question presented to or considered by the Departments, "*their decisions are final to the same extent as those of other judicial or quasi judicial tribunals*".

Vance vs. Burbank, 11 Otto 514 (25 L. Ed. 929);

Greenameyer vs. Coate, 212 U. S. 434 (53 L. Ed. 587);

Quinby vs. Conlan, 14 Otto 420 (26 L. Ed. 800);

DeCambra vs. Rogers, 189 U. S. 119 (47 L. Ed. 734).

As it can hardly be denied that the character of this land was disputed before the Department and was the one fact considered in determining the rights of the homesteaders its decision is not open to denial.

In view of the fact that the proceedings before the Department were adversary, and no charge having been made that the officials committed any

fraud, we respectfully submit that their adjudication is final.

III.

Most of the points for which we contend were presented in *McCaskill vs. United States*, 216 U. S. 506, and for that reason we risk prolixity and discuss it briefly.

The material points there considered were these: (1) that this court will rarely balance conflicting testimony where the two lower courts have agreed upon the facts; (2) that the doctrine of *United States vs. Throckmorton*, 98 U. S. 61, and kindred cases, are inapplicable where the proceedings before the Department were wholly *ex parte;* (3) that, while a corporation is a distinct entity, and, as such, entirely separate from its officers, cases arise in which their knowledge of certain facts becomes chargeable to it.

We shall discuss these points in their order:

I.

Upon the first point, the court held itself concluded by the finding of the lower court. It did so, however, not only after having found that there was conflicting testimony, but the opinion as a whole

seems to intimate that the same conclusion would have been reached upon the facts if submitted as a case of first impression.

Here there was no conflict, nor was there a particle of direct proof that Smith or the Company had knowledge that the homesteaders committed fraud. The only evidence in this regard was the Government's exhibits "G", "H", "I" and "J" and Mr. Smith's own testimony. These exhibits might raise a doubt in a suspicious mind, but fall far short of being satisfactory proof, and even this suspicion is removed by Mr. Smith's testimony.

The two exhibits dated in April, 1890, instead of showing knowledge, are proof to the contrary. The two dated in 1897 show no personal knowledge. On the other hand, Mr. Smith's testimony is clear, cogent and convincing, and is fairly contained in the following:

> "He informed me it was section 34, located near Kanascott; and he asked whether I knew about it, and I told him no; and he went on to describe then its location with reference to other mines there beyond Franklin, and within the range of Kangley and Drum and Alta and some other pieces of property that had been more or less exploited in that part of the country, and I told him then that I had an indistinct remembrance that that had been brought to my

attention some years before, but that I had never seen any report or examination of it, I was not aware of the value of it, and I did not know whether it was coal or not, and I did not care to go any further with it, that was, as to myself personally. When the company was formed, I referred it to them, and they desired first an examination. Upon that examination, they made their purchase."

(R. p. 205.)

The fact that the Government's case may entail proof of a negative, does not relieve it of its burden.

Colorado Coal Co. vs. United States, 123 U. S. 307.

The court, quoting *Greenleaf on Evidence*, said at page 319:

"Mr. Greenleaf states the rule in equivalent terms. He says, 1 *Greenleaf on Evidence*, sec. 78: 'To this general rule, that the burden of proof is on the party holding the affirmative, there are some exceptions, in which the proposition, though negative in its terms, must be proved by the party who states it. One class of these exceptions will be found to include those cases in which the plaintiff grounds his right of action upon a negative allegation, and where, of course, this negative is an essential element in his case.' And, in sec. 80: 'So, where the negative allegation involves a charge of criminal neglect of duty, whether official or otherwise; or fraud, or the wrongful violation of actual lawful possession of property; the party making the allegation must prove it, for in these cases the presumption of law, which is always

in favor of innocence and quiet possession, is in favor of the party charged'."

Colorado Coal Co. vs. United States, 123 U. S. 307.

"The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in the proceedings had in the Land Department before its issue, nor can he be called upon to explain every irregularity or even impropriety in the process by which the patent is procured."

United States vs. Marshall Mining Co., 129 U. S. 579.

"In this respect, the United States, as a landed proprietor, stand upon the same footing with the private citizen. The burden of proof in such cases is upon the Government. The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the Government charged with the alienation of public lands, can only be overcome by clear and convincing proof."

United States vs. Iron Silver Min. Co., 128 U. S. 673.

"It is true that the defendants are charged in general terms with being purchasers with notice.

"It is true that the United States is not bound by the Statute of Limitations, as an individual would be. And we have not recited any of the foregoing matters found in the bill

as sufficient of itself to prevent relief in a case otherwise properly cognizable in equity. But we think these are good reasons why a bill which seeks under these circumstances to annul a decree thus surrounded by every presumption which should give it support, shall present on its face a clear and unquestionable ground on which the jurisdiction it invokes can rest."

United States vs. Throckmorton, 98 U. S. 61.

The two lower courts, in discussing the question of *bona fide* purchasers, select certain portions of Mr. Smith's testimony, and their conclusions are based thereupon. We insist that these extracts, standing alone, or read in connection with the entire record, fail utterly to even remotely prove the issue, to say nothing of doing so in the clear, convincing and satisfactory manner declared necessary by the foregoing authorities and innumerable other decisions of this court.

On the other hand, we contend that the conclusions reached are wholly unwarranted, and that—

"So far from there being the satisfactory evidence here pointed out of a fraud against the Government having been perpetrated in this case, there is really little but suspicion, fierce denunciation, and a bitter use of such words as 'fraud', 'deceit' and 'imposition'. If the case stood alone upon the testimony introduced by the Government, it would, so far as any fraudulent purpose is concerned, do but little more

than raise a suspicion that the parties engaged in the transaction sought their own interest at the expense of the Government, and not always by the most appropriate means; but, when the testimony for the defense is considered, it refutes, not only the existence of any such fraudulent intent or dishonest acts, but it removes from the main actors in the matter even the suspicion of having used underhand and improper means for the accomplishment of their purposes."

United States vs. San Jacinto Tin Co., 125 U. S. 273.

It follows that upon the point under discussion this case falls squarely within the rule announced in *Beyer vs. Le Fevre*, 186 U. S. 114.

II.

We have already discussed the second point sufficiently, but, in passing, wish to add that, in the *McCaskill case*, the proceedings before the Department were wholly *ex parte*, and the decision merely *pro forma*. The claimant and his witnesses admitted that they were guilty of deceit. Here the proceedings were not *ex parte*, but an actual contest was held as to whether the land was coal or agricultural, one coal claimant (Williams) actually tendering the full cash payment. His testimony is not very definite as to when his contest was made, but it must have been at the time the homesteaders made final

proof. The Land Office records also show that Whitworth and his associates made repeated filings in order to keep their coal claims alive. The Register and Receiver must have taken cognizance of all these things and have dismissed the coal contest before issuing the Receiver's receipt.

It also appears that, before the patents were issued, the whole matter came before the Commissioners of the General Land Office, who cancelled the "expired but uncancelled declaratory statements" or coal applications. (R. p. 177.)

Judge Hanford in deciding the case said:

> "* * * When their final proofs were submitted, the Register and Receiver of the local Land Office were apprised of adverse claims, and by inquiry could readily have obtained as much information concerning the mineral character of the land as the Government has submitted for the guidance of this Court in the decision of this case. * * *
>
> (R. p. 186.)

He thereby again indulges in the violent presumption that these officials committed fraud, neglected their duty, and acted capriciously and arbitrarily, notwithstanding the absence of proof and the fact that the bill contains no such allegation.

The Circuit Court of Appeals, in commenting

upon Mr. Williams' testimony, says that he had witnesses to support him and that he tendered his money. They also quote this question and answer:

> "As the result of that showing they (*the Land Office officials*) (italics ours) refused to accept your tender and turned down your filing?
>
> A. Yes, sir."

The opinion then proceeds with the assertion that "the record contains no evidence that there was any formal contest in the Land Office."

Concede that the proof in this particular might have been more specific, we nevertheless submit that there is sufficient to show an actual contest. In any event, as said before, there is no suggestion in the bill or proof that these agents of the Government were guilty of malfeasance by neglecting to consider evidence of the character of this land so forcibly and frequently brought to their attention by the coal claimants. In the absence of these, it follows that, to sustain the lower courts, your Honors must not only indulge in an erroneous presumption, but go farther and reverse the Department upon a question of a fact. The result will be to vacate a patent upon speculative instead of satisfactory testimony and to usurp a jurisdiction which you have heretofore denied yourselves.

III.

In the *McCaskill case* you decided that the corporation was chargeable with knowledge acquired by its president and secretary. The proof, however, was that they had actual knowledge of the actions of the claimant and connived with him in obtaining the patents. The evidence was clear and convincing, and showed beyond doubt that the corporation was organized for the very purpose of acquiring the patented land. It was distinctly proved that these officers had actual knowledge of all the circumstances and probably aided the claimant. Here there is no such proof, nor is it even claimed that Mr. Smith, or any other person acting for appellant assisted the homesteaders.

The appellant acquired its knowledge of this land through two sources, viz: the report of the engineer employed by Smith, and the opinion of its attorney regarding the title. Mr. Smith said he knew nothing of the character of this property when Brooks first submitted it to him and it follows that the Company can only be charged with what he subsequently learned from the engineer. There is no proof that he knew whether the entrymen had acquired the land by fair means or foul, or whether they entered it under the homestead or mining laws.

This end of the matter was left to the attorney who examined the title and he knew nothing of the deal except what appeared from the abstract. For all the record shows, he may have thought that the Company was acquiring it for agricultural or other purposes. In any event, neither he or Mr. Smith had reason to suspect fraud, but were entitled to assume the validity of the patents.

There was no such lapse of time in the *McCaskill case* as shown here, and the Government proved its cause with clearness and precision.

Everything here is based upon conjecture and speculation, and the fact that the necessary negative was difficult to prove does not relieve the Government from the burden it assumed and shift it upon the appellant.

For the reason that the *McCaskill case* recognized every point for which we contend, and for the further reason that the facts here justify their application, we submit that it is a conclusive authority in our favor.

In conclusion, we respectfully submit that there was an adversary proceeding before the Department and that its decision is binding upon the Government; that the decisions of the lower courts

are absolutely unsupported by any competent or satisfactory testimony; and that all evidence of a speculative character was clearly and convincingly overcome by the testimony of Mr. Smith and other witnesses who testified on behalf of the appellant.

For the foregoing reasons we respectfully submit that the case should be reversed and the bill dismissed with costs to appellant.

Respectfully submitted.

H. R. CLISE,
CHARLES KENNEDY POE, and
CHARLES POE,
Attorneys for Appellant.